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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 413

LYNNE ANDERSON WARREN and PEOPLES FIRST NATIONAL BANK AND TRUST COMPANY (now PITTSBURGH NATIONAL BANK), Executors of Estate of JAMES M. SMITH, JR., Deceased, Petitioners,

v.

ALICE S. HIGGINS, on Behalf of Herself and Other Stockholders of SHENANGO POTTERY COMPANY (now SHENANGO CHINA, INC.), similarly situated, HILDA BARKBY, Administratrix of Estate of HARRY BARKBY, Deceased, and SHENANGO CHINA, INC., Respondents.

NO. 414

GEORGE B. ZAHNISER, DANIEL H. TRELOAR, JR., ZENO J. PFAU, JOHN B. McCARTY and ALVAH M. SHUMAKER, Individually and as Some of the Members of Castle Engineering Company, a Limited Partnership, Petitioners,

v.

ALICE S. HIGGINS, on Behalf of Herself and Other Stockholders, HILDA BARKBY, Administratrix of the Estate of HARRY BARKBY, Deceased, and SHENANGO POTTERY COMPANY now SHENANGO CHINA, INC., Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE*

This is a stockholder's derivative action filed January 5, 1950 to recover for Shenango Pottery Company

*References to the Appendices to the Petition filed herein are to the specific Appendix and page.

References to the Joint Appendix for Appellants in the Court of Appeals are by page numbers followed by "a".

References to the Consolidated Appendix for Appellants in the Court of Appeals, are by page numbers followed by "aa".

(hereafter called "Shenango") damages arising out of breaches of fiduciary duty by James M. Smith, Jr., its president, George B. Zahniser, its vice president in charge of manufacturing, and Charles W. Read, a vice president, all of whom were also directors. Daniel H. Treloar, Jr., Alvah M. Shumaker, Zeno J. Pfau and John B. McCarty, though not connected with Shenango, participated in those breaches of fiduciary duties. All were named defendants below.

The executors of the Estate of Smith, Jr., are the petitioners at No. 413 October Term, 1960. The other individual defendants (with the exception of Read who was dismissed when service could not be made on him) are the petitioners at No. 414 October Term, 1960.

The breaches of fiduciary duty involved the diversion of a corporate business opportunity, presented to Shenango in 1944, to profitably assemble various component parts into non-metallic land mines for the United States Army (i.e., Ordnance Department) (328a, 329a). That opportunity was diverted to the defendant business organization known as Castle Engineering Company (hereafter called "Castle") (330a), which the individual defendants formed specifically and solely to take up and handle the diverted opportunity (69a, 70a, 166a). The breaches also involved Shenango's actually taking a Government contract for the benefit of Castle and furnishing Castle with the use of Shenango's name, credit, funds, property and personnel to enable Castle to perform the assembly project which was diverted to it (313a-327a).

At the time of the breaches (i.e., 1944) Shenango's total of 1907-½ shares of stock was distributed among

fifty-three shareholders, but more than half (1053 shares) were owned by Smith, Jr., Zahniser, Read and their families (233a, 234a, 312a). It had six directors, including Smith, Jr., Zahniser and Read (265a).

The shareholders, as such, had for a long time been denied all rights in connection with the company's operations and were furnished with no information. No shareholders' meetings were held from May 15, 1931, until February 4, 1949 (313a). Minority shareholders who attempted to secure financial information were informed that it was none of their business (113a-115a), and in one meeting were ordered how they should vote (114a).

At that time (1944) Shenango was the world's largest producer of vitrified china (i.e., ceramic ware) and made hotelware and dinnerware (Ex. 293, p. 19). It had 2400 employees and a 900,000 square foot plant covering sixteen acres in New Castle, Pennsylvania (212a; Ex. 293, p. 20). It had production lines, machinery, conveyors, kilns (some mechanically operated—which Shenango had built itself), a machine shop, machinists, an engineer, and lathes that could be and were devoted to making machines (85a, 86a). It had space available to take on the assembly process (303a). It was financially sound with available resources (303a).

On the other hand, the Castle organization went through several stages. It was first an informal organization (Pltf. Ex. 11, 162a; Pltf. Ex. 12, 166a; Pltf. Ex. 15, 176a). At one time it was proposed that it function as a corporation (32a-35a) but on February 21, 1944, that corporation was not yet in existence (35a). Finally, on March 22, 1944, a so-called limited partnership was formed (Pltf. Ex. 1, 147a-150a).

However, from January, 1944, on (Pltf. Ex. 12, 166a); those interested in Castle included Smith, Jr., Zahniser, Read, Treloar, Jr., an insurance agent (59a), Pfau, an automobile dealer who had other war work (365a), Shumaker, an attorney (353a, 354a), and McCarty, a bar manager (64a).

The non-metallic land mine business began in the spring of 1942, when the United States Army initiated a project to develop a non-metallic, non-magnetic, anti-tank land mine (Defendants Ex. 12, 256a). At that time Onondaga Pottery Company, an organization similar to Shenango and Shenango's largest competitor in its ordinary business (76a, 77a), was called in by the Government, given a general idea of the type of land mine wanted, and asked to take on a research and development contract to develop the product which the Army desired. Although Onondaga had never engaged in that type of work before, it took on the project and by January, 1943, developed the plans for such a mine. The main and largest parts of the mine were a ceramic bell and base, which were assembled with a number of smaller non-metallic pieces and the whole assembly encased in a waterproof covering (294a, 295a).

Because the ceramic bell and base were the limiting parts (i.e., those most difficult to obtain), in 1943, additional research and development contracts were given to others, including Ohio Brass Company (Def. Ex. 12, 256a, 257a).

All the research and development contracts were awarded by the Government with the understanding that, inasmuch as the project was for the United States and for the war effort, all the experience, techniques and

background would be made available to any new producers later coming into the field (36a, 37a, 299a).

By the latter part of 1943 and early 1944, all of the research and development contractors had developed a mine, had installed the production lines to produce it and had a complete list of suppliers of the non-ceramic parts. All were assembling the entire land mine with ceramic parts manufactured by themselves and other parts purchased from other suppliers. The assembly process merely involved fitting together machined parts designed to be so fitted (294a-297a). No special type of plant space or skilled personnel were required (297a).

In 1942 and early 1943, about the same time the land mine was being developed, Smith, Jr., Treloar and Pfau had investigated, for themselves, the possible adaptability of china and porcelain to such war items as bombs, mines and similar objects. Smith, Jr., had developed an idea for an aerial practice bomb made of cast gypsum and cement and they had presented the idea to procurement agencies (Pltf. Ex. 15, 175a, 176a).

Materials were plentiful and the labor required for such an operation sufficiently abundant to make the operation attractive. However, their efforts proved fruitless. During that period, no formal organization involving the three named defendants existed but eventually they were a part of the Castle organization (Pltf. Ex. 15, 176a)

Smith, Jr., was particularly interested in war work and, on a number of occasions, visited a war project in which Pfau had an interest (366a, 367a).

In late 1943 or early 1944, after the Pittsburgh Ordnance District had surveyed the area and found that

Shenango (but not Castle, which was not even formally in existence then) was a possible supplier of land mines, it contacted Shenango to see if Shenango were interested in producing mines (75a, 83a, 298a). About the same time, Smith, Jr., had personally manifested an interest in the land mine business (Def. Ex. p, 254a).

On January 31, 1944, Shenango was sent plans for the mines and was requested to advise the Pittsburgh Ordnance District if it were interested in producing mines (Pltf. Ex. 161, 220a). At that time Shenango was advised by the Pittsburgh Ordnance District that it would be supplied with full information relating to the mines and their parts as well as their manufacture and assembly (including names of suppliers of parts) developed or to be developed by others in the program (299a).

Meanwhile, and although the Pittsburgh Ordnance District contacts were exclusively with Shenango (35a; Pltf. Ex. 2, p. 133 preceding 155a), Smith, Jr., of course, learned of the opportunity and began efforts to secure the land mine business (or the assembly portion thereof) for the Castle group (Pltf. Ex. 11, 162a; Pltf. Ex. 12, 166a, 167a). In January 1944, both he and Treloar were engaged in the preliminary work necessary to secure a contract for the Castle group (Pltf. Ex. 11, 162a; Pltf. Ex. 12, 166a, 167a). Nevertheless, during this period, all contacts were made in the name of Shenango (35a).

Before February 5, 1944, Smith, Jr., had evidently decided that the assembly of land mines constituted a valuable opportunity and had indicated to a prospective supplier of parts that Shenango would bid for it (Ex. 307, following 234a).

Then on February 5, 1944, Smith, Jr., Zahniser and James K. Love, another officer and director of Shenango, inspected Onondaga's land mine operation (292a) ostensibly for the purpose of determining the advisability of Shenango's participating in the business. However, neither Zahniser nor Mr. Love made any particular preparations for the trip, and neither of them considered the economic aspects of the land mine business (117a, 128a, 129a; Pltf. Ex. 316, 241a). Smith, Jr., however, concluded that land mine assembly would be profitable but did not then so advise anyone (129a; Pltf. Ex. 316, 241a). Nevertheless, while at Onondaga, Smith, Jr., Zahniser and Love ostensibly decided Shenango should not become interested in any aspect of the land mine business (106a). This decision was informally reported to the other members of Shenango's Board of Directors, none of whom objected to the decision (106a, 107a). No report was made to the shareholders (107a). There was no formal board action and the decision was never reconsidered in the light of later events (107a).

Thus, the first decision that Shenango would not be interested in the land mine business was made by two individuals already interested in securing the business for themselves (Pltf. Ex. 12, 166a), and was based wholly upon subjective considerations (303a).

Such decision ignored the fact that Onondaga, which was generally similar to Shenango, was assembling land mines; ignored the fact that Shenango had the capability of taking and performing a contract for the assembling of land mines (303a); and ignored the facts which made it possible for Castle to easily perform the contract with Shenango's furnishing ceramic parts, and with other assistance from Shenango.

Moreover, within ten days after the trip, Castle submitted a bid for 100,000 land mines which indicated that Castle expected to make a profit of $73,300 on the contract (Pltf. Ex. 132, 208a). Smith, Jr., told Zahniser (129a), Pfau (368a) and McCarty (371a) that the assembly was a profitable opportunity. Furthermore, that bid indicated that Shenango would supply the ceramic parts and was thus willing to assume the most difficult part of the business and the part that was the key to the business (76a, 78a, 120a, 121a, 131a, 132a, 173a; Ex. 132, opposite 208a; Def. Ex. 12, 256a, 259a, 260a). At no time did the Castle group ever consider an alternative source of ceramic parts (134a-135a). Shenango was always essential to the business (313a). Conversely, Shenango never evidenced any interest in selling ceramic parts to anyone but Castle.

The ceramic bell and base were much different than the chinaware ordinarily produced by dinnerware manufacturers. The mine parts were larger and heavier than dinnerware, and had to be threaded to fit with other pieces, a technique not involved in making dinnerware (296a). The threading was complicated by the fact that during the firing of the parts in kilns, shrinkage occurred (132a, Pltf. Ex. 13, 173a).

Shortly after the return from Onondaga Pottery Company, and despite any ostensible decisions made on that trip, Pittsburgh Ordnance District was almost immediately informed that Shenango itself was interested in bidding on mines (41a-43a; Ex. 2, p. 133, preceding 155a; 300a). Consequently, on February 8, 1944, Shenango was listed by the Pittsburgh Ordnance District as a prospective supplier of mines and Pittsburgh Ord-

nance District, after confirming Shenango's interest, then sent Shenango a request for proposals and bidding instructions. (41a-43a; Pltf. Ex. 294. 223a-226a). Any such proposal had to be filed by February 15, 1944. Castle did not receive any request for proposals (35a). It was not even formally in existence.

On February 10, 1944, the request for proposals and bidding instructions were received by Shenango (Pltf. Ex. 294, 224a).

On February 11, 1944, (292a), Smith, Jr., Pfau and Treloar visited the Ohio Brass land mine operation, which was similar to that of Onondaga Pottery Company—i.e., Ohio Brass manufactured ceramic (i.e., porcelain). bells and bases and assembled the mines from those as well as purchased items (296a). On the evening of Febrauary 11, 1944, Mr. Hicks, a manufacturer of machinery, was called concerning the making of some machines for the proposed operation (133a, 292a). On February 12, 1944, Smith, Jr., and Treloar visited Pittsburgh Ordnance and that evening saw Mr. Hicks in order to have him build certain machinery for Shenango (133a).

Between February 8, 1944, and February 15, 1944, suppliers were contacted by Shenango or in Shenango's name (314a-319a).

No bid was submitted in Shenango's name, but on February 15, 1944, Castle Engineering Company, which was at that time merely a corporation in the process of being formed, submitted a bid for furnishing 100,000 land mines at a total cost of $733,400.00 in response to the request for proposals sent to Shenango on February 8, 1944 (Ex. 132, Opp. 204a to 210a). The bid desig-

nated Smith, Jr., as the bidder's negotiator, gave the bidder's address as "c/o Shenango Pottery Co., New Castle, Pa.," and contained information about the bidder (Castle) which was actually descriptive of Shenango. At the time the bid was submitted, Castle was not organized, had no assets, no facilities, no place to operate (its address was in care of Shenango) and no employees (133a, 134a).

The Castle bid listed Shenango as the supplier of the ceramic parts. Thus, by February 15, 1944, the Shenango decision that it not take part in the land mine business had been modified to the extent that it would undertake the production of ceramic parts for Castle. These parts were the most expensive component of the mine (179a; Ex. 132, opposite 208a) and their manufacture was not only extremely risky but also involved techniques unfamiliar to producers of dinnerware (76a-78a, 120a, 121a, 296a). Their manufacture would also interfere directly with the regular Shenango products, and require the diversion of personnel therefrom (120a).

Shenango's supplying ceramic parts was essential to Castle inasmuch as Castle never contemplated any other source for ceramic parts (134a. 135a). In making its decision to produce the ceramic parts, Shenango ignored the normal procedure of consulting with the head of the manufacturing division which would produce the item and preparing molds and trial samples to determine if the project were feasible (51a-54a). Shenango's decision to make the parts was made personally by Smith, Jr. and Zahniser (52a, 115a, 128a, 135a). Moreover, the price for them was set by Smith, Jr., and Treloar, at a price lower than Smith Jr., had wanted for Shenango (135a).

After, as well as before, the submission of the bid in Castle's name, extensive negotiations were conducted with suppliers of parts in the name of Shenango by both Smith, Jr., and Treloar (313a-323a) and such suppliers were led, or permitted, to believe that Castle was an adjunct of Shenango (284a, 285a, 287a), as were other persons (Pltf. Ex. 2, 155a; Pltf. Ex. 14, 174a).

Even though no contract had been awarded, and the only bid was in Castle's name, on February 18, 1944, Shenango placed on order for the conveyor ultimately used in the Castle assembly operations (318a). On the same date it also placed an order for 100,000 fuse adapters and 100,000 base plugs to be used in the assembly operation (317a). On February 19, 1944, Shenango placed an order for 100,000 diaphragms for the mine assembly (319a).

On February 19, 1944, Articles of Incorporation for the proposed Castle Engineering Company were executed (32a-35a). Its Certificate of Incorporation was not issued until February 25, 1944 (35a). The original directors of Castle included Treloar, Pfau, Zahniser, Smith, Jr., and Shumaker (33a, 34a). No capital was paid in and a total capitalization of only $50,000 was contemplated (Def. Ex. 9, 249a). The corporate form for business was abandoned early in March (78a), for tax reasons (356a) and or because of credit (Def.. Ex. 9, 248a).

On February 21, 1944, the Castle bid was rejected by the Pittsburgh Ordnance District, either because Castle's credit was not satisfactory or because it was not yet in existence (67a, 68a, 84a; Pltf's Ex. 132, opposite 204a). When the bid in Castle's name was rejected, Castle still had no money, no property, no assets, no employees, and no assured manufacturing site (133a,

134a). On the same date, at the request of Smith, Jr., Shenango submitted a bid for 100,000 land mines. Shenango took the contract so that Castle could perform it with Shenango to supply the ceramic parts (68a, 69a, 84a, 301a, 302a).

The arrangement was made upon the basis that the contract be assigned to Castle, upon its incorporation and with the understanding and condition that Castle Engineering Company purchase from Shenango Pottery Company the two china parts for the new land mine at a price of $2.00 per set of two pieces, f. o. b. Shenango Pottery Company (302a). There was no mention that Shenango would be paid only for parts incorporated in mines accepted by the Government (302a). Shenango did not, at that time, or at any other time, consider any alternative (107a, 109a, 110a, 123a-130a, 134a, 135a). Shenango was not supplied with the information developed by Smith, Jr., or others, and gave no consideration whatsoever to the risks it might take by contracting (e.g., the rigid tests involved), to the nature and capabilities of Castle, to the extent of its obligations or to the business possibilities of assembling the mines itself (123a-130a). Smith, Jr., insisted that it not do so (69a, 304a) as had Zahniser (116a, 120a). Shenango was then, as at all other relevant times, fully capable of handling the assembly of land mines (303a).

The Pittsburgh Ordnance District, at all times in considering the award, relied on the fact that Shenango was a responsible company capable of producing the mines (280a, 298a, 349a, 350a; Ex. 2 following 153a).

The Shenango bid was accepted by Pittsburgh Ordnance District on February 26, 1944, for the stated reason that Shenango was an "Established concern with

good management and an engineering staff capable of producing item." (Ex. 2, p. 131, following 153a). Subsequently, contract W-36-061-ORD-663, calling for the sale of 100,000 land mines at a total price of $733,400 was entered into between Shenango and the United States (304a). Under the contract all 100,000 mines were to be furnished prior to July 31, 1944 (Ex. 141). The contract was not assignable and was not assigned to Castle (Ex. 141; 81a, 83a). However, Castle assembled all mines under that contract, for the contract price, but no written contract was entered into between Shenango and Castle covering their relationship (37a, 83a).

The government test for acceptance of the completed mines required that they withstand a drop test and an underwater test, both of which were rigidly fixed and applied (Pltf. Ex. 13, 172a, 173a; 287a). Passage of neither test was controlled by the ceramic parts (287a, 288a). However, under the arrangement between Shenango and Castle, Shenango was only paid for ceramic parts included in land mines accepted by the Government (287a, 288a). Thus Shenango assumed a substantial portion of the risk incident to the success of Castle's assembly operation. The $2.00 price for its ceramic parts depended upon Castle's correct assembly of the mines, regardless of the quality of the ceramic parts Shenango furnished Castle (287a). That arrangement was unknown even to Zahniser (87a, 90a). It saved Castle several thousand dollars, even though no mines were rejected (Pltf. Ex. 11, 163a).

Following the submission of the Shenango bid, extensive negotiations with suppliers of items to be used by Castle continued in the name of Shenango (315a-

317a, 319a-322a). Shenango placed an order for assembly parts (316a) and also placed an order on March 3, 1944, under which it bought and paid for all fuse adapters used in completing the first contract as well as some used in completing the second contract (321a-322a). Shenango also bought and paid for a great quantity of items which it supplied to Castle, but for which it did not bill Castle until much later (322a, 324a). Neither Mr. Love nor Zahniser was advised or knew that Shenango was furnishing such help to Castle (130a, Def. Ex. 9, 246a, 247a).

The first capital contributions to Castle were not made until March 13, 1944, when $22,950 was paid in. An additional $9,250 was paid on April 8, 1944 (Pltf. Ex. 296, 230a). Although the certificate of limited partnership executed by the partners stated that $50,000 cash capital had been contributed (148a), the total contribution during the period of the first contract was only $32,200. The balance of the $50,000 capital was paid on August 18, 1944, after the successful completion of the first contract (230a).

All of the Castle partners knew that the land mine opportunity had first been presented to Shenango (80a, 355a, 357a, 367a), all of them knew of Smith, Jr.'s connection with Shenango (80a, 355a), all of them knew that ceramic parts were to be purchased from Shenango (80a, 355a), all of them knew that Castle was unsuccessful in securing a contract and that Shenango had taken the first contract enabling Castle to perform it (79a, 360a, 369a), and all of them were kept informed of the developments in connection with the land mine business (79a).

Castle assembled the land mines in an old skating rink leased on March 6, 1944 (293a). All of Castle's production employees, about 52 women (Pltf. Ex. 16, 181a), were previously inexperienced (Pltf. Ex. 15, 180a) and were secured through the United States Employment Service (82a, 83a). Castle's equipment consisted only of a non-motorized conveyor, work tables and two relatively small machines (54a-56a) which were essentially the same as those used at Onondaga and Ohio Brass Company (297a). The total cost of machinery and equipment used by Castle during the first contract was only $13,027.20 of which Shenango originally furnished machinery and equipment worth $3,926.83 (Pltf. Ex. 302, 231a). Some of Castle's machinery was made in the Shenango machine shop (53a, 54a). Castle's production line was developed by Smith, Jr. (Pltf. Ex. 16, 180a); and all executive and management functions were handled by Smith, Jr., and Treloar (Pltf. Ex. 12, 167a).

Smith, Jr., worked long hours at Shenango in developing a machine to make the ceramic parts and in training Shenango employees to make the ceramic parts to the required tolerances (57a, 76a-78a). The latter was difficult because the personnel were not used to close tolerances and had no experience in making threaded parts (77a). Zahniser also spent considerable time working on the ceramic part of business at Shenango (57a).

Castle began production of land mines in mid-May, 1944, and completed the first contract on time, by July 31, 1944 (Ex. 2, pp. 122-124, Ex. 15). Castle received information and help from the research and develop-

ment contractors which would have also been available to Shenango (37a, 299a).

During the period of preparation and production under the first contract, Castle received extensive help from Shenango. The $32,200 cash contribution of the partners (Pltf. Ex. 296, 230a) was far less than the $150,000 which was estimated as necessary for working capital (Pltf. Ex. 144, 218a) and unsuccessful attempts were made to borrow money from banks (Pltf. Ex. 15, 177a). Despite the need for funds, Smith, Jr., Treloar, Pfau and McCarty did not pay the $17,800 they collectively owed to the partnership on their capital contributions until after the first contract had been successfully completed (Pltf. Ex. 296, 230a). Beginning in March and continuing thereafter, Shenango built machinery for Castle (53a), furnished labor, materials of all kinds, parts for the assembly operation as well as ceramic parts (323a, 324a). None of these items were paid for until long after furnished and not until Castle had received sufficient funds from the delivery of land mines to the Government to enable it to do so conveniently (Pltf. Ex. 295, 227a-229a). Castle's indebtedness to Shenango was at least as high as $160,187.65 on one occasion (Pltf. Ex. 295, 227a). In most instances Shenango paid Castle for land mines before Shenango received payment from the Government and made payments without offsetting the very large amounts which Castle owed it (Pltf. Ex. 295, 227a, 326a, 327a). Some of the payments, especially those in June, were advances to Castle to cover checks which Castle had issued (96a-98a, 325a-327a).

Castle subsequently received two additional contracts for land mines, the first being given to Castle at

the request of Shenango (Pltf. Ex. 2, 151a, 152a). Receipts from the land mine business constituted Castle's only income (69a, 70a). Performance of the contracts was completed in October, 1944 (305a).

On efforts lasting less than ten months, with only the management services of Smith, Jr., and Treloar, Castle made $326,603.71 on an investment which never exceeded $32,200.

The Court of Appeals twice reviewed these facts and twice reached the same conclusion, best summarized by its own statement (Appendix A, pp. 11, 12):

> "Plaintiff's above detailed evidence clearly points to a conflict between the Shenango officer and director defendants' obligation to their company and their self-interest. That evidence indicates those defendants used most every element of Shenango but the hotelware product itself for their own selfish interest."

Both the District Court and the Court of Appeals agreed on most points, both legal and factual, presented by the case.

Both found that the opportunity to furnish non-metallic land mines to the Government was a corporate opportunity of Shenango (306a). Both courts found that the Government was willing, at all times, to contract with Shenango for such land mines (280a, 284a). They found that Shenango was capable of embracing that opportunity and of fully performing all aspects of the Government contracts involved (303a, Appendix A, p. 9). Both courts found that Shenango could have performed the functions actually performed by Castle (303a; Appendix A, p. 9).

Both courts below found that when that opportunity was first extended to Shenango, Smith, Jr., Zahniser and Love (another officer and director of Shenango), after examining the production facilities for non-metallic land mines in operation at Onondaga Pottery Company, recommended that Shenango not embrace the opportunity (264a; Appendix A, p. 3). Both courts below also found that, almost immediately after February 5, 1944, the defendants, and particularly Smith, Jr., were attempting to secure that very business for Castle (276a, 277a, 284a-286a, 314a-322a; Appendix A, p. 8). Both found that Smith, Jr., and Zahniser were instrumental in having Shenango furnish Castle certain ceramic parts for the mine, which were the most important, the largest and by far the most difficult and expensive parts (265a, 266a, 313a; Appendix A, p. 4).

Both courts found that, on February 15, 1944, Castle submitted a bid to the government to furnish it land mines, but that Castle could not secure a contract (301a, 313a; Appendix A, p. 3). Both courts found that, on February 21, 1944, Smith, Jr., Zahniser and Read (all officers and directors of Shenango and also interested in Castle) were instrumental in having Shenango take a contract for land mines, assume all responsibilities to the Government for its performance, and then permit Castle to perform those parts of the contract which Castle desired, even though on that date Castle was merely a "paper" company (301a, 304a, 338a; Appendix A, p. 11). Both courts also found that Shenango furnished the ceramic parts for the mine (the largest, the most expensive and the most difficult parts to make and obtain) under an arrangement whereby Shenango was only paid for the ceramic parts incorporated in completed

mines accepted by the Government. Both recognized that Shenango, therefore, assumed a specific substantial portion of the risk of Castle's assembly operations, in addition to the general risks arising from Shenango's responsibility to the Government for the entire perfomance of the first contract (287a, 288a; Appendix A, p. 4).

Both Courts below also found that, beginning in early February, 1944, and almost continuously thereafter, the name, the assets, the credit, the funds and the personnel of Shenango were used, in a myriad of ways, for Castle's benefit and to enable Castle to get into and perform the land mine business (313a-322a; Appendix A, p. 5). Both courts below found that as a result of this diversion of corporate opportunity, Castle made an operating profit of $326,603.71 on its land mine operations (later reduced to $181,603.71 by renegotiation), on an investment of ony $32,200, in the short space of about ten months, with a management consisting solely of Smith, Jr., Shenango's president, and Treloar, an insurance salesman (294a, 415a, 416a, 419a, 420a; Appendix A, pp. 5, 9).

The District Court and the Court of Appeals were in full agreement as to the applicable Pennsylvania law and that thereunder the existence of personal interests of Smith, Jr., and Zahniser (and Read), which conflicted with their fiduciary duties to Shenango, made them liable to Shenango because those personal interests were favored. (276a-288a; Appendix A, pp. 11, 12). The Court of Appeals further held that the use of the name, assets, credit, funds and personnel of Shenango for Castle's benefit, and therefore for the benefit of Smith, Jr. and Zahniser, involved further breach of fiduciary duty imposing liability.

The District Court in its final decision, and the Court of Appeals upon review, were also in full agreement as to the damages to be allowed Shenango, $262,456.58, and the factors, both factual and legal, to be taken into consideration in assessing those damages. Both courts agreed that no deduction should be allowed for any services of Smith, Jr. or Treloar. Both Courts below agreed that the action was not barred by laches under Pennsylvania law.

The Court of Appeals and the District Court disagreed on only two matters. The District Court, though finding that Smith, Jr. and Zahniser (as well as Read) breached their fiduciary duty to Shenango, concluded that they were acting in "good faith" when they did so; the Court of Appeals, after examining all of the evidence and findings, held that such a conclusion was "clearly erroneous." The District Court also held that the defendants Treloar, Pfau, Shumaker and McCarty were not liable; the Court of Appeals twice held that, under the Pennsylvania law relating to partnership, agency and notice, those defendants were also jointly and severally liable to Shenango.

ARGUMENT

Introduction

This case does not involve any question of Federal substantive law. It involves only the substantive law of the Commonwealth of Pennsylvania. The decision depends solely upon the application of that Pennsylvania law to the facts. Except to the extent that petitioners question the Court of Appeals' right to reject one finding of the lower court—that of the "good faith" of certain of the petitioners — no question of Federal law is even suggested. Significantly, as will be pointed out hereafter, that factual issue, sought to be made a Federal question, is immaterial to the decision of the case.

Petitioners request this Court to reverse the Court of Appeals' decision as to the Pennsylvania law. Petitioners then request this Court to sift evidence and to review certain findings of fact of the courts below. Therefore, rather than being a case appropriate for review by this Court, it involves issues which this Court has traditionally refused to review. The Courts of Appeals were created to decide finally cases of this type.[1] Review by this Court should, for that reason be denied. Further analysis of the specific grounds for review asserted by Petitioners will confirm the conclusion that the case is not one appropriate for review by this Court.

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1. Dissenting opinion of Mr. Justice Frankfurter in *Dick v. New York Life Ins. Co.*, 359 U. S. 437, 3 L.ed 2d 935, 79 S.Ct. 921.

I.

This Court should not review the holdings of the Courts below as to the applicable substantive law of Pennsylvania with respect to the fiduciary duties of corporate officers and directors..

All the petitioners request (pages 8 to 10 of the Petition at No. 413; pages 19 and 20 of the Petition at No. 414) this Court to review this case so as to establish or clarify a basic principle of law applicable to corporate officers and directors. Under *Erie R. Co. v. Tompkins*, 304 U.S. 64, 82 L.ed. 1188, 58 S.Ct. 817 (1938) Pennsylvania law is to be applied. Hence, this Court's function would only be to ascertain and apply Pennsylvania law. Any pronouncement by this Court on the substantive legal principles involved would merely decide this specific case for the parties hereto. It would not be binding upon the Pennsylvania courts, nor upon any other court applying state law, if a similar question arose.

Furthermore, because, quite properly, this Court limits its review to cases involving important legal principles which should be settled authoritatively for future reference, it should not review this case. The decision here will be of significance only to the immediate parties with respect to the facts of this case and the law of Pennsylvania. The case is in the Federal Courts only because of diversity of citizenship.

Moreover, as this Court has frequently pointed out, it will adopt the conclusions of a Court of Appeals as to the state law, particularly when the Court of Appeals sits in the state whose law is being applied. *Propper v.*

Clark, 337 U.S. 472, 93 L.ed. 1480, 69 S. Ct. 1333; *The Tungus v. Skovgaard*, 358 U.S. 588, 593, 3 L.ed. 2d 524, 530, 79 S. Ct. 503; *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 674, 94 L.ed. 1194, 1201, 70 S. Ct. 876; *Spiegel's Estate v. Commissioner*, 335 U.S. 701, 93 L.ed. 330, 69 S. Ct. 301, 337. This is true even where the state law affects a Federal issue properly presented for review. *A fortiori* this is so where the issue is *purely* one of state law.

Both the Court of Appeals and the District Court below sit in Pennsylvania. Judges McLaughlin, Kalodner, Goodrich and Hastie of the Court of Appeals, as well as Judge Willson of the District Court, have had long experience with Pennsylvania law. Both courts had two opportunities to delve into and apply the Pennsylvania law. On each occasion, those courts, without dissent, recognized the same Pennsylvania law—that corporate officers and directors are prohibited from taking any action which benefits them when they have any interest which does, or which might, conflict with their fiduciary duty to their corporation. As the Court of Appeals further held, Pennsylvania law also precludes their profiting, individually, from any use of corporate assets or positions. Those principles of the Pennsylvania law are well established.[2] The Pennsylvania cases are clear that

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2. *Bailey v. Jacobs*, 325 Pa. 187, 189 Atl. 320 (1937), and *Lutherland, Inc. v. Dahlen*, 357 Pa. 143, 53 A.2d 143 (1947), are leading cases in this field. Other apposite cases are: *Weissman v. Weissman, Inc.*, 374 Pa. 470, 97 A.2d 870 (1953); *Weisbecker v. Hosiery Patents, Inc.*, 356 Pa. 244, 51 A.2d 811 (1947); *Gilmore v. Gilmore Drug Co.*, 279 Pa. 193, 123 Atl. 730 (1924); *Glenn v. Kittanning Brewing Co.*, 259 Pa. 510, 103 Atl. 340 (1918); *Porter v. Healy*, 244 Pa. 427, 91 Atl. 428 (1914); *Tenth*

a fiduciary may not even place himself in a position where self-interest might conflict with fiduciary duty.[3] Similarly, they prevent a corporate officer or a corporate director's profiting, in the least, from his position.[4] Nor is damage to the corporation necessary; personal profit alone brings liability.[5]

The correctness of the decision here is also apparent when Petitioners' argument is seen in true perspective. Essentially, their argument is:—officers and directors of a corporation may recommend, and help decide, that their corporation is not interested in a profitable opportunity though it is well able to handle it; thereafter, having done so, those officers and directors are then entirely free to consider the opportunity as their own and are also free to use the corporation, its name, credit, assets, funds and personnel, when and as needed to aid

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National Bank v. Smith Construction Co., 242 Pa. 269, 89 Atl. 76 (1913); *Douglass-Whisler Brick Co. v. Simpson*, 233 Pa. 515, 82 Atl. 759 (1912); *Commonwealth Title Insurance Co. v. Seltzer*, 227 Pa. 410, 76 Atl. 77 (1910); *Graham v. Cummings*, 208 Pa. 516, 57 Atl. 943 (1904); *Bird Coal & Iron Co. v. Humes*, 157 Pa. 278, 27 Atl. 750 (1893); *Hill v. Frazier*, 22 Pa. 320 (1853); Compare: *Chalupiak v. Stahlman*, 368 Pa. 83, 81 A.2d 577 (1951); *East & West Coast Service Corp. v. Papahagis* (No. 1), 344 Pa. 183, 25 A.2d 339 (1942).

3. *Bailey v. Jacobs, supra*, 325 Pa. at 194, 189 Atl. at 324; *Noonan Estate*, 361 Pa. 26, 63 A.2d 80 (1949); *Lutherland, Inc. v. Dahlen, supra; Weisbecker v. Hosiery Patents, Inc., supra.*

4. *Bailey v. Jacobs, supra; Lutherland, Inc. v. Dahlen, supra; Commonwealth Title Insurance & Trust Co. v. Seltzer, supra; Douglass-Whisler Brick Co. v. Simpson, supra.*

5. *Bailey v. Jacobs, supra*, 325 Pa. at 194, 189 Atl. at 324, 325.

them in securing and performing that opportunity for themselves. If such is the law, the shareholders in the corporations of Pennsylvania, and of the other states, are at the complete mercy of the managers of their investments. We, like the Court of Appeals for the Third Circuit and the United States District Court for the Western District of Pennsylvania, are certain that such is not the law of Pennsylvania.

Any review by this Court would, therefore, necessarily require affirmance of the judgment based upon application of Pennsylvania law to the facts. Hence no review should be undertaken.

II.

This Court should not review the findings of fact of the Courts below.

Petitioners urge this Court to review the decision of the Court of Appeals because, it is argued (pages 10 to 20 of Petition at No. 413; pages 10 to 18 of Petition at No. 414) that the Court of Appeals erred in holding that the District Court's finding of "good faith" was clearly erroneous.

As pointed out heretofore, a finding as to the "good faith" or the "bad faith" of any of the Petitioners is immaterial to the decision. The Pennsylvania law, as found by both the District Court and the Court of Appeals, imposes liability on any corporate officer or director whoever places himself in a position of potential conflict between self-interest and fiduciary duty and who then favors himself by his action. It also imposes liability whenever a corporate officer or director uses corpo-

rate assets or position for his own benefit. The courts do not attempt to weigh his motivation. For this very reason, the District Court found that Smith, Jr., and Zahniser breached their fiduciary duty even though it also found they acted in "good faith."

The Court of Appeals twice announced the same rule as that applied in the District Court when it said (Appendix A, p. 11):

> "'They [the directors and officers] were bound to act in the utmost good faith. They could not deal with the funds and property of Shenango nor utilize the influence and advantage of their offices for any but the common good. If they made a personal profit through the use of Shenango's assets they were accountable for it to the stockholders; they were not permitted even to place themselves in a position which invited conflict between their self-interest and their integrity.' (citing Lutherland, Inc. v. Dahlen, 357 Pa. 143 (1947); Bailey v. Jacobs, 325 Pa. 187 (1937))."

Accordingly, the review sought by petitioners would involve merely an academic discussion of the effect of certain evidence in the case. This Court has indicated that it does not exist for that purpose.

Even if the issue of "good faith" were material, a review would be merely to determine whether the Court of Appeals or the District Court correctly interpreted the evidence. No basic legal problem is presented for decision. Rule 52(a) permits a Court of Appeals to reverse findings of fact which it finds to be "clearly erroneous." That is what the Court of Appeals found here.

Moreover, as this Court held in *United States v. United States Gypsum Company*, 333 U.S. 364, 395, 92 L.ed. 746, 766, 68 S. Ct. 525 (333 U.S. at 395):

> ". . . A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

Analysis of its opinion shows that the Court of Appeals applied that very test in holding that the conclusion of "good faith" was clearly erroneous. It looked at the entire record. The significance of a number of related actions, taken over a short period of time, all having the same common denominator of favoring the self-interest of Smith, Jr., and his associates, was not lost upon the Court of Appeals. The use of Shenango's assets, name, credit, funds and personnel was placed in its true perspective. Such factors—occurring and recurring throughout the record—resulted in the inescapable conviction that the lower court's conclusion of "good faith" was clearly erroneous.

Thus—although petitioners attempt to create the contrary impression—petitioners' argument is supported solely by limited oral testimony of certain of the petitioners themselves, while the Court of Appeals' conclusion is supported by undisputed facts, as well as by a great number of documents taken from the petitioners' files and used in their own business, including their own statements, some made under oath. As Petitioners at No. 414 acknowledge (p. 11 of their Petition) where, as here, testimony conflicts with such documents the action of the Court of Appeals is proper. Compare *United States v. United States Gypsum Company*, supra.

This argument on "good faith," we believe, typifies the defense to this action. It consists largely of excoriating the Court of Appeals, and particularly Judge McLaughlin, for giving credence to the sworn and other written statements *of the petitioners themselves.* The success of petitioners' argument, oddly enough, depends upon establishing that the petitioners themselves lied in 1944 and 1946 in their statements to various renegotiation agencies. So viewed, the attempt to avoid the effect of those written statements by suggesting they were not contemporaneous with the events seems rather specious. In fact, they were far more contemporaneous with the events than any oral testimony offered in the 1950's. Treloar's letter to the Price Adjustment Division of Pittsburgh Ordnance District, in which he established the prior interest of Smith, Jr., Pfau and himself in securing war work of the very type later made available to Shenango, was dated December 30, 1944—within several months after production of land mines terminated (Pltf. Ex. 15, 175a-176a). The letter of Castle's attorney was dated January 19, 1946 (Pltf. Ex. 11, 161a-164a). The petition to the Tax Court, which established that activities on behalf of Castle began in January, 1944, was sworn to by all the petitioners on June 19, 1946 (Pltf. Ex. 12, 165a-169a). All this was long before the present action was filed and before the first letter on behalf of plaintiff below demanding redress.

The Court of Appeals quite properly concluded either that the documentary evidence was true, thus conclusively establishing "bad faith," or that, if not true, the individuals who prepared those documents were so loose with the truth that no confidence could be placed in their protestations of innocence—particularly when

such protestations were incompatible with acknowledged facts and other documentary evidence.

The argument on "good faith" is further typified by the reference to the testimony of Mr. Downie (p. 12 of Petition at No. 143). He did not corroborate Petitioners' position. His testimony clearly established that the Pittsburgh Ordnance District always considered Shenango as the responsible party (348a-350a).

The entire "good faith" argument may be evaluated by pointing out only a few examples of demonstrable inaccuracies in the petitions filed herewith.

The argument of Petitioners at No. 413 (p. 18 of that petition) that Smith, Jr., pledged his personal fortune to the venture, completely ignores the uncontradicted fact that when he, and his associates, caused Shenango to take the entire land mine contract and assume responsibility for 100,000 land mines at a price of $733,400, for *Castle's benefit,* it was then contemplated that Castle operate as a corporation with only $50,000 capital (Def. Ex. 9, 249a) (although $150,000 was estimated as the necessary working capital for the Castle venture (Pltf. Ex. 144, 218a). Only because certain suppliers refused to deal with the proposed corporation (Castle) was the partnership substituted (256aa). Thus Shenango was the unwitting beneficiary of the demand of *other suppliers.*

Likewise revealing is the assertion by Petitioners at No. 414 (p. 16 of that petition) that on February 21, 1944, "an effective assembly group had been formed by Castle" and (p. 17 of the same petition) that there was "money subscribed, there was chosen leadership and the

demonstration of their capabilities." For it is uncontradicted that at that time Castle had no money, no place to operate, no experience in assembly work, and no employees (133a, 134a).

III.

This Court should not review the determination of damages by the Courts below.

Petitioners ask this Court to review the question of damages, particularly suggesting error in the failure to allow a management expense to Smith, Jr. and Treloar (pages 20 to 23 of Petition at No. 413; pages 23 to 26 of the Petition at No. 414).

Both the District Court and the Court of Appeals held, under the law and the facts, that the proper damages were the profits of Castle after renegotiation, without any credits. Any legal problem would involve only Pennsylvania law. The factual matters were fully considered by the two lower courts and their concurrent findings should be accepted.[6]

Petitioners attempt to create an issue for review by pointing to an alleged inconsistency with the holding in *Central Ry. Signal Co. v. Longden*, 7 Cir., 1952, 194 F.2d 310. The argument ignores a fundamental fact. *Central Ry. Signal Co. v. Longden, supra* was not decided under Pennsylvania law. This case is to be decided under Pennsylvania law. If the two cases were inconsistent,

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6. *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275, 93 L.ed. 672, 677, 69 S. Ct. 535; *Great A. & P. Tea Co. v. Supermarket Equip. Corp.*, 340 U.S. 147, 153, 95 L.ed. 162, 167, 71 S. Ct. 127.

this Court would not bring them into accord because, under *Erie v. Tompkins, supra*, it does not establish state law. It is for this reason that inconsistent Courts of Appeals decisions involving state laws do not warrant a review.[7]

However, the decisions are not inconsistent. A wide factual difference is apparent. Here Smith, Jr., was drawing a salary from Shenango. Had Shenango performed the contract, he would have received no extra compensation. The courts below apparently did not believe that Treloar's management services would have been essential had Shenango performed the contracts. Nor, apparently, did they value such services as do petitioners. Furthermore, such salary allowances were not taken into consideration in the renegotiation proceedings, which permitted Castle a net profit of $181,603.71 after expenses. Had such salary allowances been included as an expense, Castle would have been allowed the same, or possibly a higher, net profit. Hence, the net amount of profit would have remained the same and was the proper recovery to Shenango.

Moreover, as the Court of Appeals pointed out, Treloar was a direct participant in the breaches of fiduciary duty (Appendix A, p. 14). Thus the allowance of any return to him, whether by way of salary or of profit, would profit a wrongdoer. The law does not permit a wrongdoer to profit from his wrongful conduct.

The further argument that Shenango's profit from the land mine business should be offset against its recovery from Castle was fully answered by the Court

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7. *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 82 L.ed. 1290, 58 S. Ct. 860.

of Appeals when it observed that "leaving behind a part of the spoils is hardly justification" for taking the rest (Appendix A, p. 5). The Courts below properly recognized that all benefit of the land mine business—both the profit from the manufacture of ceramic parts and the profit from assembling land mines—should have gone to Shenango and would have gone to Shenango but for the breaches of fiduciary duty. Hence, no such credit is allowable.

Both Courts below, after an exhaustive review of the facts, concluded that no credit should be given against the recovery. To review this matter would merely involve a re-evaluation of the facts. We submit this Court should decline to do so.

IV.

This Court should not review the Court belows decision that the action was not barred by laches.

Petitioners suggest that this case should be reviewed because the action is barred by laches (pages 23 to 25 of Petition at No. 413; pages 20 to 22 of Petition at No. 414).

The Court of Appeals has twice held that under Pennsylvania law laches is not an element in this case (Appendix A, p. 18). As it pointed out in its first opinion (256 F.2d at 511), Shenango could have brought suit at law at any time within six years against the defendants. Therefore, the plaintiff stockholder could also bring suit at any time within six years. Otherwise, the defendants whose control of the corporation prevented its bringing action, could destroy the corporation's rights by their wrongful conduct in preventing institution of action

against them.[8] The cases cited by petitioners are inapposite.

Furthermore, the District Court refused to find any facts to support any holding of laches. This was not "clearly erroneous" and hence under Rule 52 (a) would be conclusive in any event.

Again all Petitioners seek is the review of Pennsylvania law and of the facts. No question of Federal law is presented. Hence, this Court should decline to review the matter.

V.

This Court should not review the case because one of the respondents sold some, but not all, of her stock.

Petitioner at No. 413 suggest (p. 25) that because plaintiff below, and members of her family, sold some of their stock after judgment was entered for Shenango and while the appeals were pending a review is justified.

Of course these matters are not of record. Even so, Plaintiff-respondent still retains, according to Petitioners, about 5% of one class of Shenango's stock and 3% of its total stock. Petitioners can point to no legal requirement that plaintiff own more stock than she does. It seems quite obvious that Shenango's right of recovery is not to be affected by the fact that, after judgment is

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8. See: *Strickler v. McElroy*, 40 Pa. Super., 277 (1909); *Galway v. Metropolitan Elevated Rwy. Co.*, 128 N.Y. 132, 28 N.E. 479 (1891); *Pollitz v. Wabash R. Co.*, 207 N.Y. 113, 100 N.E. 721 (1912); *Pfeiffer v. Berke*, 121 N.Y.S.2d 774, 779 (Sup. Ct. 1953); *Gross v. Price*, 127 N.Y.S.2d 729, 736 (Sup. Ct. 1953), opinion adhered to in 128 N.Y.S.2d 209, 212 (Sup. Ct. 1953), modified on other grounds 284 App. Div. 964, 134 N.Y.S.2d 649 (1954).

entered, the one protecting its interests sells some, but far less than all, of her stock.

This law suit has dragged on for over ten years. It is not usual that during such an extended period of time a shareholder may have occasion to change somewhat her shareholdings. The argument which attempts to destroy Shenango's right of recovery because of such a change typifies the petitioners' position here. They are desperately engaged in a final attempt to avoid their legal responsibility to Shenango, and to all of its shareholders, arising from the clear violations of fiduciary duty.

VI.

This Court should not review the holding of the Court of Appeals that the Petitioners are jointly and severally liable.

The Petitioners at No. 414 request review (pages 27 to 33 of their petition) because they have been held jointly and severally liable to Shenango. (The Petitioners at No. 413 have not raised this question.)

The District Court and the Court of Appeals have both held that the corporate officers and directors are jointly and severally liable for the breaches of fiduciary duty (417a-422a; Appendix A, p. 18). This is clearly the law of Pennsylvania.[9] Their decision should be accepted.

The Court of Appeals also held the other Petitioners (Treloar, Shumaker, Pfau and McCarty) jointly and

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9. *Fell v. Pitts*, 263 Pa. 314, 106 Atl. 574 (1919); *Cochran v. Shetler*, 286 Pa. 226, 133 Atl. 232 (1926); *Komenarsky v. Brode*, 307 Pa. 156, 160 Atl. 713 (1932).

severally liable as participants in a breach of trust, under familiar and well-settled rules of partnership and agency law (Appendix A, pp. 12, 13). It also held that they were liable on the theory of constructive trust (Appendix A, p. 13). The factual basis for its holding of liability included said other Petitioners' admissions of knowledge of circumstances amounting to legal notice of the breaches of fiduciary duty (Appendix A, pp. 14-16). Because those conclusions are well-supported by the authorities cited in the opinion of the Court of Appeals, they too should be accepted. Moreover, as the Court of Appeals pointed out, this ground of liability makes any consideration of the alleged limited partnership status immaterial (Appendix A, p. 5). Furthermore, said status would, in any event, be purely a matter of Pennsylvania law.

The fact that on March 22, 1944, (293a) the Petitioners attempted to form a limited partnership — although in fact and law, their failure to pay in their stated capital[10] prevented the formation of a valid limited partnership—can not affect the wrongful conduct which occurred theretofore and the damage to which Shenango became entitled as a result of that wrongful

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10. The assertion (p. 28 of petition at No. 414) that "The contributions were all fully made in time" is simply not accurate. The first capital contributions to Castle were not made until March 13, 1944 when $22,950 was paid in (Pltf. Ex. 296, 230a). An additional $9,250 was paid on April 8, 1944 (Pltf. Ex. 296, 230a). Although the certificate of limited partnership executed and *sworn to* by the partners— all the Petitioners here —stated that $50,000 cash capital had been contributed (Pltf. Ex. 1, 147a-151a), the total capital of $50,000 was not paid in until August 18, 1944 after the completion of the first contract (Pltf. Ex. 296, 230a).

conduct. The breach of fiduciary duty in diverting the corporate opportunity occurred in February, 1944. The law does not permit wrongdoers to arrange their affairs, after having committed a wrong, so as to limit the rights of the wronged party. Otherwise, wrongdoers might effectively destroy the right of recovery by carefully delineating responsibility to suit themselves. For this reason, Pennsylvania law holds that all who are members of a limited partnership which participates in wrongful conduct of the type disclosed here are jointly and severally liable.[11] Accordingly, this Court should not review this question.

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11. *Guillou v. Peterson*, 89 Pa. 163 (1879).

CONCLUSION

We, therefore, respectfully submit that this case is not one which should be reviewed by the Supreme Court of the United States. It was properly decided by the Court below. The decision of the Court of Appeals should finally terminate this action now pending in the Federal Courts for more than ten years.

Respectfully submitted,

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